IN THE MISSOURI SUPREME COURT

GENE R. KUNZIE,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	**SUPREME COURT NO. SC87022**
	)	
CITY OF OLIVETTE, MISSOURI,	)	
	)	
Defendant/Respondent.	)	
	)	

ON APPEAL FROM THE CIRCUIT COURT OF SAINT LOUIS COUNTY, 21st JUDICIAL CIRCUIT, DIVISION 1 THE HONORABLE ROBERT S. COHEN, JUDGE CAUSE NO. 04CC-000386

UPON TRANSFER FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT IN APPEAL NO. ED85119 BEFORE HON. CLIFFORD AHRENS, HON. NANNETTE BAKER AND HON. GLENN NORTON

SUBSTITUTE BRIEF OF RESPONDENT, THE CITY OF OLIVETTE, MISSOURI

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I. JURISDICTIONAL STATEMENT

Although Respondent, The City of Olivette, Missouri, contends the instant appeal is baseless, it acknowledges that upon transfer from the Missouri Court of Appeals for the Eastern District, the Missouri Supreme Court has jurisdiction over the instant appeal of Hon. Robert S. Cohen's dismissal of the underlying lawsuit upon Defendant/Respondent's Motion to Dismiss pursuant to the Supreme Court's appellate jurisdiction, as described in Article V, Section 10 of the Constitution of the State of Missouri.

II. STANDARD OF REVIEW

Prior to addressing the facts adduced before the trial court, as well as those facts included in Appellant's Substitute Brief, it is important, indeed necessary, in order to comply with Rule 84.04(c), to identify the appropriate Standard of Review to be utilized in the assessment of this Appeal.[1]

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. *Freeman v. Leader Nat. Insurance Co.*, 58 S.W. 3d 590, 596 (Mo. App. E.D. 2001); *see also Cedar County Mem'l Hosp. v. Nevada City Hosp.*, 987 S.W.2d 422, 424 (Mo.App. W.D. 1999) (same standard of review for failure

[1] Appellant's Substitute Brief failed to properly state the appropriate Standard of Review to be used in its Appeal. Instead, Appellant's Brief uses the section entitled "Standard of Review" to present his argument regarding the merits of the instant appeal. By presenting argument in the course of attempting to assert the appropriate standard of review, Appellant has not complied with Supreme Court Rule 84.04(c) of the Missouri Rules of Civil Procedure and the Appeal should be dismissed in its entirety. *See, Evans v. Groves Iron Works, et al., supra*. 982 S.W.2d 760, 761 (Mo. App. E.D. 1998). The Court of Appeals recognized Kunzie's Brief failed to meet the requirements set forth in Rule 84.04. Court of Appeals Decision, p. 7, note 3. Although Kunzie has been put on notice with respect to these deficiencies, his Substitute Brief similarly fails to comply with Rule 84.04. Kunzie's abject failure to file a brief in compliance with Rule 84.04 warrants dismissal.

to state a claim because no private right of action exists). Review of a motion to dismiss for failure to state a claim is a *de novo* examination of whether the petition invokes principles of substantive law. *Rychnovsky v. Cole*, 119 S.W.3d 204, 208 (Mo. App. W.D. 2003). A dismissal will be affirmed if it can be sustained on any ground supported by the motion, even if the trial court did not rely on that ground. *McCarthy v. Peterson*, 121 S.W.3d 240, 243 (Mo.App. E.D. 2003). *City of St. Louis v. Cernicek*, 145 S.W.3d 37, 41 (Mo.App. E.D. 2004).

III. STATEMENT OF FACTS[2]

A. BACKGROUND AND PROCEDURAL HISTORY.

The instant appeal arises from the trial court's dismissal of Kunzie's Third Amended Petition upon Defendant's Motion to Dismiss (ROA p. 189, 192-193). Accordingly, the facts relevant to the instant appeal are rather limited. Respondent, the

[2] The "Statement of Facts" contained in Kunzie's Substitute Brief is rife with argument and, therefore, is not compliant with Supreme Court Rule 84.04(c). It has long been recognized an appellant's failure to set forth a fair and concise statement of the facts in its brief is fatal, requiring dismissal of the appeal. *Kleinhammer v. Kleinhammer*, 225 S.W.2d 377, 378 (Mo. App. 1949); *Walker v. Allebach*, 189 S.W. 2d 282, 283 (Mo. 1945); *Commerce Bank of Kansas City v. Conrad*, 560 S.W. 2d 388, 390 (Mo. App. 1977). In light of Kunzie's abject failure to comply with Rule 84.04, this Court should dismiss Kunzie's appeal in its entirety or, in the alternative, strike Kunzie's "Statement of Facts."

City of Olivette (hereinafter "the City"), is a municipality located in Saint Louis County, Missouri (Second Amended Petition, ¶4, ROA[3] p. 2-3). Appellant Kunzie (hereinafter "Kunzie") was formerly employed by Respondent as the City's Building Commissioner and Director of Public Works (Second Amended Petition, ¶4, ROA p. 33; SLF D(11) and D(12), Olivette Municipal Code §§ 20.250 and 20.255, Appendix at A23 - A24).

Kunzie filed the instant lawsuit on January 28, 2004 (ROA p. 5). Kunzie filed an Amended Petition on February 26, 2004 and, with leave of Court, filed a Second Amended Petition on March 22, 2004 (ROA p. 18, 32). On April 9, 2004, the City filed a motion for an extension of time to file an Answer or other responsive pleading (ROA p. 44-46). By an Order dated April 9, 2004, the trial court granted the City's motion for additional 20 days to file an answer of other responsive pleading (ROA p. 44). Pursuant thereto, the City submitted its Motion to Dismiss Kunzie's Second Amended Petition in its entirety on May 6, 2004 (ROA p. 47-50, SLF). The City's Motion to Dismiss was called for a hearing before Hon. Robert S. Cohen on July 16, 2004, whereupon the parties were afforded an opportunity to present their respective positions to the Circuit Court (ROA p. 131-132).

[3] As referenced throughout Respondent's Substitute Brief, as well as the documents in support thereof, "ROA" shall refer to the document submitted by Kunzie titled "Record On Appeal" and "SLF" shall refer to the document submitted by the City titled "Supplemental Legal File."

On July 26, 2004, ten (10) days *after* the trial court heard oral argument on the City's Motion to Dismiss, Kunzie filed a Motion to Amend and File a Third Amended Petition By Interlineation (ROA p. 150-152). Pursuant to Kunzie's Motion to Amend, the title of Count II of the Second Amended Petition was changed (ROA p. 150-152). On July 27, 2004, one day after Kunzie filed his Motion to Amend the Second Amended Petition By Interlineation, prior to a hearing on the issue and without an opportunity for the City to respond, the Circuit Court granted Plaintiff's Motion to Amend his Second Amended Petition (ROA p. 3). On August 27, 2004, after a full briefing period and a hearing before Hon. Robert S. Cohen, the City's Motion to Dismiss was granted in its entirety (ROA p. 4, 189, 192-193). Following Kunzie'Motion for Clarification of Judgment, the Circuit Court revised his August 27, 2004 Order and Judgment to include the term "with prejudice" (ROA p. 192-193). Thereafter, on September 8, 2004, Kunzie initiated the instant appeal (ROA p. 4).

B. FACTS RELATING TO THE TRIAL COURT'S DISMISSAL OF KUNZIE'S LAWSUIT.

1. Claims Stated In Kunzie's Second Amended Petition.

Kunzie's Second Amended Petition contained the following claims: (1) a wrongful discharge claim, (2) a claim for violation of various City ordinances, the City Charter, the City Employee Handbook, state laws and (3) a claim for breach of contract. In the portion of his petition setting forth allegations applicable to all claims, Kunzie asserted he satisfied all of the conditions precedent to maintaining the instant lawsuit, however, Kunzie did not indicate he exhausted his administrative remedies (ROA p. 40).

2. Facts Relating to the Claim Set Forth In Count I of The Second Amended Petition.

In the first count of Kunzie's three (3) count Petition, Kunzie alleged the City terminated his employment after he identified allegedly unsafe conditions and disrepair of the Dielman Road culvert, the allegedly unsafe condition of a City-owned backhoe and the City's alleged failure to make several buildings accessible to persons with disabilities and reported said issues to the City Manager and City Council (ROA p. 32-41). The reporting of such conditions falls within Kunzie's job duties (ROA p. 33-41, Second Amended Petition, ¶ 9, 11, 12, 14, 15; SLF D(11) and D(12), Olivette Municipal Code §§ 20.250 and 20.255).

3. Facts Relating to the Claim Set Forth in Count II of The Second Amended Petition.

In Count II of the Second Amended Petition, Kunzie alleged Defendant violated Ordinances, Municipal Code Provisions, Policies, Handbooks and various State laws and such violations caused Kunzie's alleged wrongful termination and related damages (ROA p. 41). Kunzie failed to indicate what basis existed for a private right of action against the City for its alleged violation of any ordinances, policies, handbooks or the cited Missouri Statutes (ROA p. 41).

4. Facts Relating to Plaintiff's Amendment of Count II in the Second Amended Petition.

On July 26, 2004, ten (10) days *after* the City's Motion to Dismiss was argued before Judge Cohen, Kunzie filed a motion to amend his Petition by interlineation to change the title of Count II (ROA p. 3, 150-152). The next day, July 27, 2004, before the City had an opportunity to respond, Kunzie's Motion to Amend was granted and the title of Count II was changed from "Count II – Violation of Olivette Municipal Code, City Ordinances, Policies, Handbooks" to "Count II – Wrongful Termination in Violation of Policies, Handbooks, Charter, State Laws and other Public Policy Interests" (ROA p. 3). Kunzie did not amend the substance of Count II of his Petition (ROA p. 151, ¶ 4). In his Motion to Amend the Second Amended Petition By Interlineation, Kunzie asserted the revision to the title of Count II would not alter the substantive nature of the Second Amended Petition (ROA p. 151, ¶ 4).

5. Facts Relating To The Claim Set Forth In Count III Of Plaintiff's Second Amended Petition.

Kunzie's Petition, appears to indicate his alleged breach of contract claim set forth in Count III arises from Plaintiff's eligibility for retirement in 2007 (ROA p. 41-42). According to paragraphs 22, 26, 31, 45, 46 & 47 of the Petition, Kunzie alleges the City was in breach of contract by terminating his employment before he received full retirement benefits (ROA p. 38-42). Kunzie also alleges the City denied him unspecified, vacation pay, accrued sick pay and educational benefits, which the City was allegedly contractually obligated to provide, by terminating his employment (ROA p. 41-42).

6. Facts Relating To The Ruling Of The Court Of Appeals.

Upon appeal to the Missouri Court of Appeals, Eastern District, the instant case was fully briefed and argued. On June 28, 2005, the Court of Appeals ruled Kunzie was not obligated to exhaust the administrative remedy provided pursuant to the City Code because he was an at-will employee. Additionally, the Court held the act of terminating Kunzie's employment was a proprietary, as opposed to a governmental, function; as such, the City was not immune from Kunzie's lawsuit by virtue of the doctrine of sovereign immunity.[4]

[4] Upon reviewing the Court of Appeal's ruling, the City filed a Motion for Rehearing and/or Transfer to the Supreme Court which was summarily denied. On July 6, 2005, this Court granted the City's application for transfer thereby initiating the instant proceedings.

I. ARGUMENT

A. THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION BY SUSTAINING THE CITY'S MOTION TO DISMISS BECAUSE KUNZIE FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED IN THAT THE CITY WAS ACTING IN ITS GOVERNMENTAL CAPACITY AND WAS IMMUNE FROM SUIT PURSUANT TO THE DOCTRINE OF SOVEREIGN IMMUNITY.

1. The Management and Operation Of The City's Public Works Department, Including The Personnel Functions Associated Therewith, Constitutes A Governmental Function .

The State and its various political subdivisions are immune from most tort claims. *See*, Mo.Rev.Stat. §§ 537.600, 537.610, Appendix at A11 - A15. Municipalities,[5] such as the City of Olivette, enjoy a limited form of sovereign immunity. *Jungerman v. City of Raytown*, 925 S.W.2d 202 (Mo. banc 1996). The immunity enjoyed by a municipality only applies with respect to governmental functions - those functions of the municipality

[5] In the context of sovereign immunity analysis, "Municipalities" include only cities, towns or villages that are incorporated. *Metropolitan Page v. Metropolitan St. Louis Sewer District*, 337 S.W.2d 348, 352-53 (Mo. 1964); *D'Arcourt v. Little River Drainage District*, 212 Mo. App. 610, 245 S.W.2d 394, 396 (Mo. App. 1922).

performed for the common good of all. *Jungerman, supra*. Conversely, municipalities have no immunity for torts while performing proprietary functions - those functions performed for the special benefit or profit of the municipality acting as a corporate entity.[6] *Jungerman, supra* at 204; *see also, City of Hamilton v. Public Water Supply District No. of Caldwell County*, 849 S.W.2d 96, 102-103 (Mo. App. W.D. 1993). Pursuant to Mo.Rev.Stat. § 537.600, sovereign immunity is waived with respect to

[6] *Junior College District of St. Louis v. City of St. Louis*, 149 S.W.3d 442, 447 (Mo. banc 2004) and *City of Hamilton v. Public Water Supply District #2 of Caldwell County*, 849 S.W.2d 96, 102-103 (Mo.App.W.D. 1993), which were relied upon by the Eastern District are clearly inapplicable. In *Junior College District of St. Louis v. City of St. Louis*, 149 S.W.3d 442, 447 (Mo. banc 2004) the Missouri Supreme Court distinguished between supplying water for fire suppression, a governmental function, and selling water to customers for profit or revenue, a proprietary function. *Id.* The cases do nothing to further the notion that a personnel decision is a proprietary function. Similarly, in *City of Hamilton v. Public Water Supply District #2 of Caldwell County*, 849 S.W.2d 96, 102-103 (Mo.App.W.D. 1993), the Western District found that when a municipality acts in a commercial capacity to sell a commodity for a fee, then the municipality may be held liable in its private corporate capacity. Both of these cases hold that selling water for profit, a function traditionally associated with private entities, is proprietary; neither case classifies a city manager's decision to terminate an employee as proprietary.

injuries directly resulting from negligent acts or omissions by public employees arising out of the operation of motor vehicles in the scope of their employment and injuries caused by the dangerous condition of public property. *Id.* at Appendix A11. Such waiver of sovereign immunity occurs regardless of whether governmental entity was acting in a governmental or proprietary capacity. *See,* Mo.Rev.Stat. § 537.600, Appendix at A11; *Wollard v. City of Kansas City*, 831 S.W.2d 200, 202 (Mo. banc 1996).

Additionally, when public entities purchases liability insurance for tort claims, sovereign immunity is waived to the extent of, and for the specific purposes of, the insurance purchased. *See*, Mo.Rev.Stat. § 537.610, Appendix at A14; *Fantasma v. Kansas City, Mo., Bd. of Police Com'rs*, 913 S.W.2d 388, 391 (Mo.App. W.D. 1996). *See* also, Mo.Rev.Stat. § 71.185 (permitting municipalities engaged in the exercise of governmental functions to carry liability to cover claims arising from the exercise of governmental functions). *Any waiver of sovereign immunity, however, is to be construed narrowly. Id*.

In the instant case, Kunzie has not alleged he suffered an injury covered by the express waiver set forth in Mo.Rev.Stat. § 537.600. *See*, Appendix at A11. Instead, Kunzie argues the City waived its sovereign immunity with respect to his alleged wrongful discharge by purchasing liability insurance. Kunzie's allegation impliedly concedes the City's termination of his employment constituted a governmental act. The Court of Appeals, however, ruled the City's termination of Kunzie's employment constituted a proprietary function which was not covered by the doctrine of sovereign immunity. *See*, Court of Appeals Decision, p. 5-7.

2. The City Did Not Waive Its Immunity From Suit Through The Purchase Of Insurance.

Pursuant to §537.610(1):

> The…governing body of each political subdivision of this state…may **purchase** liability **insurance** for tort claims, made against the…political subdivision…**Sovereign immunity** for…political subdivisions is ***waived*** only to the maximum amount of and ***only for the purpose covered by such policy of insurance*** purchased pursuant to the provision of this section….

As alleged by Plaintiff, the City does, indeed, maintain liability insurance (ROA p. 39, ¶ 30). The policy, however, expressly excludes coverage for claims for which sovereign immunity would otherwise exist under Missouri law:

> We will use the defense of sovereign immunity, to which you may be entitled as a public entity, only when you agree with us in its use. If you do not agree with us in using the defense of sovereign immunity, you release us from all liability because of our failure to raise such defense.

Although the City admits it purchased insurance coverage, the City *did not* waive its defense of sovereign immunity by doing so. *See, State ex. rel. Ripley County v. Garrett*, 18 S.W. 3d 504, 504-508 (Mo. App. S.D. 2000). The City continues to enjoy sovereign immunity pursuant to §537.610(1). *See, State ex. Rel. Ripley County v. Garrett*, 18 S.W. 3d 504, 504-508 (Mo. App. S.D. 2000). The endorsement referenced above preserves the defense of sovereign immunity. Clearly, based on the provision

stated above, the policy excludes coverage for cases in which sovereign immunity would apply.

Kunzie's Petition does not raise ***any*** of the claims statutorily excluded from the scope of the doctrine of sovereign immunity (relating to the operation of automobiles or the dangerous condition of public property). §537.600. R.S. Mo. Plaintiff has not alleged the City's immunity was waived by operation of any statute. Furthermore, the City has clearly not waived its immunity from suit. Accordingly, Kunzie cannot proceed with his lawsuit against the City inasmuch as his claim is barred by the doctrine of sovereign immunity.

3. Management And Operation Of Municipal Department Constitutes A Governmental Function.

Relevant precedent indicates the executive management and operation of a public works department constitutes a governmental function inasmuch as the department is operated for the good of the public at large and not as a corporate function of the City. For example, in *Jungerman, supra*, this Court unequivocally held that the operation of a municipal police department constitutes a governmental function. *Id.* at 205. In *Theodoro v. City of Herculaneum,* 879 S.W.2d 755 (Mo. App. 1994), the Court of Appeals noted:

> [t]he creation of a municipal fire department is for the benefit of the general public, and therefore, any act or omission of the municipality associated with the performance of this service is a governmental function for which the municipality ordinarily may not be held liable.

Id. at 761; *see also, Claxton v. City of Rolla*, 900 S.W.2d 635, 636 (Mo.App. S.D. 1995); *St. John Bank & Trust Co. v. City of St. John*, 679 S.W.2d 399, 401 (Mo.App. E.D. 1984)(". . . the operation and supervision of a police department are acts involving the discretion of public officials, they constitute the exercise of a governmental function.").

Specifically relevant to the instant case, the hiring and firing of city employees is a governmental, not proprietary, activity. *Nichols v. City of Kirksville*, 68 F.3d 245, 247-48 (8th Cir. 1995), *citing*, *State el rel. Gallagher v. Kansas City*, 319 Mo. 705, 7 S.W.2d 357, 361 (1928); *see also*, *Aiello, v. St. Louis Community College District*, 830 S.W.2d 556 (Mo. App. E.D. 1992). Such activities constitute governmental functions even where the terminated employee performed work associated with a proprietary function. *See*, *Nichols v. City of Kirksville*, 68 F.3d 247-48 (8th Cir. 1995). These human resource and management functions are clearly distinguishable from the types of activities which have been characterized as being for the profit or special benefit of a municipality. *See, e.g., City of Hamilton, supra*; *Junior College District of St. Louis, supra*.

In *Aiello v. St. Louis Community College District*, 830 S.W.2d 556 (Mo. App. E.D. 1992), the Eastern District examined whether the management of a community college district and the termination of employees employed thereby constituted a governmental function covered by the doctrine of sovereign immunity. In *Aiello*, an administrative assistant to the vice-chancellor of the community college district sued for wrongful discharge and negligent supervision. Plaintiff claimed she was terminated because she objected to the vice-chancellor's filing of false expense reports. *Id.* at 557. As in the instant case, trial court dismissed plaintiff's case for failure to state a claim upon which

relief could be granted and plaintiff appealed. *Id.* After acknowledging the governmental-proprietary distinction was dispositive with respect to Plaintiff's claim, the Eastern District examined whether the vice-chancellor's actions with respect to Plaintiff's claims were within the scope of his managerial and administrative duties. *Id*. at 558-559. The Court of Appeals found sovereign immunity applied because the vice-chancellor, as a school administrator was acting in the scope of his managerial and administrative duties - a governmental function. With respect to Plaintiff's allegation of wrongful discharge, the Court explained:

> Here, ***acts of the Vice-Chancellor and his staff, as school administrators, are clearly within the government side of the dichotomy***. Plaintiff expressly states in her petition the acts alleged to be tortious were done within the scope of administrative duties of a school administrator. ***Their role is to carry out the governmental mandate*** for education within the context of the Junior College District…***There is no special benefit in this act, nor has plaintiff provided us with any reason to construe this act as proprietary.***

Id. After stating the management of the school's funds and its employees' handling of such funds was a government function, the Court went on, noting:

> . . . The allocation of monies, the purpose of which is to facilitate the higher education of the state's citizenry, is an act the trustees perform as agents of a municipal corporation. ***Supervision of school district employees***

> ***allowed to utilize these funds to further the educational goals of the district is, as well, fulfilling a governmental function***.

Id. at 559.

In, *Aiello,* the Court of Appeals stated the performance of administrative and executive duties critical to the execution of the District's educational mandate, including the supervision and management of personnel, constituted a governmental function. *Aiello, supra*; *Nichols, supra*. Applying the foregoing precedent to the facts in the instant case, it is clear Kunzie's claim was properly dismissed. All of Kunzie's claims arise out of his alleged wrongful discharge. The foregoing precedent establishes the decision to terminate a City employee is made as part of the city's manager's administrative/executive duties with respect to the management of human resources and that such decisions are within the ambit of a governmental function.

Kunzie, the former head of the City's public works department, complains he was separated from employment after he provided internal recommendations with respect to several issues which he characterizes as affecting the general welfare and public safety (ROA p. 34-38). Kunzie also asserts that as head of the public works department, he was responsible for communicating such recommendations regarding issues affecting public safety and the general welfare to the City Manager and the City Counsel. *Id*. In other words, Kunzie alleges his employment with the City was terminated because he was doing what he was obligated to do in his position as head of the public works department and as building commissioner – namely, informing the City Council and City Manager of

the need to prioritize, budget, and implement certain modifications and repairs to various public properties to insure the general welfare and safety of the public.

Municipal governments have many demands on their time, personnel, capital assets and finances. In their continuing effort to serve the public, municipal decision-makers are forced to make difficult decisions when allocating limited resources to meet seemingly unlimited demands. Although some work performed by municipalities, such as repairs to streets and alleys, *German v. Kansas City*, 512 S.W.2d 135,142 (Mo. banc 1974), the sale and delivery of potable water, *Junior College District of St. Louis, supra*, street cleaning, *David v. City of St. Louis*, 612 S.W.2d 812, 814 (Mo. App. Ed. 1981), has been characterized as proprietary activity by Missouri courts, such work is drastically different from the executive level administration of municipal government, generally, or its discrete departments, specifically. *Aiello, supra*; *Nichols, supra*.

In the instant case, Kunzie made various recommendations and the City was left to evaluate not only whether Kunzie's assessment was accurate, but the feasibility, nature and scope of the City's response to the issues Kunzie purported to raise. To determine the appropriate response to Kunzie's recommendations, the City Manager and City Council confronted various administrative, legislature and policy issues.

Kunzie does not allege he was harmed by the City's alleged failure to repair the Dielhman Culvert, increase accessibility for the handicapped or repair the city-owned backhoe. Instead, Kunzie alleges his employment was terminated because he recommended addressing these accessibility and safety issues. Making such recommendations is the first step in the process established to provide local government,

local services and local resources to the public served by the City of Olivette. This deliberative process of government is conducted for the "good of all" not for a "special benefit" to the City acting in a corporate capacity. *See, City of Hamilton v. Public Water Supply District No. 2 of Caldwell County,* 849 S.W.2d 96, 102-103 (Mo. App. W.D. 1993).

In *Aiello*, the Court analyzed plaintiff's characterizations of the activity she deemed as the cause of her wrongful discharge - activities relating to the operation of the junior college district - and held the defendant was "performing a government function and therefore, was immune from suit." *Aiello, supra* at 558. In the instant case, Kunzie alleges his termination arose from acts relating to the execution of his duties as building commissioner – making recommendations to the City Manager and City Council with respect to issues he felt needed to be addressed. In light of the foregoing precedent, it is clear Kunzie's making such recommendations, the City's response thereto and management and operation of its various departments – including the personnel decisions made in conjunction therewith (i.e. the termination of Kunzie) – are appropriately characterized as governmental functions. *Aiello, supra*. As such, Kunzie's claim was appropriately dismissed.

4. Since The City's Immunity Was Not Waived Pursuant To The Statute Or The Purchase Of Insurance, The City Is Immune From Suit With Respect To Kunzie's Claim Of Wrongful Discharge.

In his challenge to Defendant's assertion of sovereign immunity, Plaintiff disregarded Missouri's statutes, case law and constitution in favor of an inapplicable federal standard based upon the Supreme Court's interpretation of the Eleventh Amendment (Appellant's Brief at p. 59-62). The City has never asserted Eleventh Amendment immunity from suit. Sovereign immunity in the State of Missouri is a creature of statute. *See* § 567.610(1) R.S. Mo. (2004). While it is certainly true that municipalities enjoy only the limited sovereign immunity granted by the State Legislature pursuant to § 567.610(1), such immunity applies in the instant case in light of the terms of the coverage purchased by the City. *See Epps v. City of Pine Lawn*, 353 F.3d 588, 593-595 (8th Cir. 2003)(holding City did not waive sovereign immunity by purchasing insurance through MOPERM and was immune from liability with respect to plaintiff's retaliatory discharge claim). Because the management and operation of the City's Public Works Department is a governmental function, the discretionary immunity doctrine is applicable. *Jungerman, supra at 205*.

As a municipality, the City of Olivette is protected by discretionary immunity, a more restrictive type of sovereign immunity recognized in Missouri. *Jungerman v. City of Raytown,* 925 S.W.2d 202, 204 (Mo.1996); *see also, Epps v. City of Pine Lawn*, 353 F.3d 588, 593 (8th Cir. 2003). Under Missouri's discretionary immunity doctrine, a city is

not liable for the manner in which it performs discretionary duties. *See, Jungerman, supra* at 205, *citing, Foster v. City of St. Louis*, 71 Mo. 157, 158 (1979); *Casty v. City of St. Joseph*, 247 Mo. 197, 152 S.W.2d 306, 309-10 (1912); *Hayes v. City of Kansas City*, 362 Mo. 368, 241 S.W.2d 888, 891 (1951); *Epps, supra.* Discretionary acts require "the *exercise of reason* in the adoption of means to an end and *discretion in determining how or whether an act should be done or course pursued*." *Jungerman, supra, citing* Kanagawa *v. State By and Through Freeman*, 685 S.W.2d 831, 836 (Mo. banc 1985), *quoting Rustici v. Weidemeyer*, 673 S.W.2d 762, 769 (Mo. banc 1984).

In contrast, ministerial acts require certain duties to be performed "upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, *without regard to [an employee's] own judgment or opinion concerning the propriety of the act to be performed*." *Id., citing Kanagawa*, 685 S.W.2d at 836. The final determination whether an act is discretionary or ministerial is based on the facts of each case - particularly on factors such as the nature of a given official's duties, and the extent to which the act involves policy making or the exercise of professional expertise and judgment. *Kanagawa, supra*.

In *Sherrill v. Wilson*, 653 S.W.2d 661, 669 (Mo. banc 1983), this Court held *hiring* is a discretionary function, and that there should be no right of action against a public official for alleged negligence in the hiring process. Decisions regarding the termination of employees are of the same nature and character as decisions relating their hiring. *Gavan v. Madison Memorial Hosp.*, 700 S.W.2d 124, 128 (Mo.App. E.D. 1985). Accordingly, since hiring decisions are found to be a discretionary function and protected

by official immunity, it follows that discharging or firing is also protected. *Id*.; *see also, Epps v. City of Pine Lawn,* 353 F.3d 588, 593-595 (8th Cir. 2003)(holding City did not waive sovereign immunity by purchasing insurance through MOPERM and was immune from liability with respect to plaintiff's retaliatory discharge claim); *State ex rel.Public Housing Agency of the City of Bethany*, 98 S.W.3d 911, 914 (Mo.App.W.D. 2003)(recognizing, "sovereign immunity applies to actions for retaliatory or wrongful discharge"); *St. John Bank & Trust v. City of St. John*, 679 S.W.2d 399, 401 (Mo.App.E.D. 1984)(acknowledging that "although the operation and supervision of a police department are acts involving discretion of public officials, they constitute the exercise of a governmental function, the immunity for which is waived by the purchase of insurance"); *Duncan v. Creve Coeur Fire Prot. Dist*., 802 S.W.2d 205, 207 (Mo. App. 1991) and *Krasney v. Curators of Univ. of Mo.*, 765 S.W.2d 646, 650 (Mo. App. 1989).

In light of the foregoing, it is clear the decision to terminate Kunzie's employment was clearly a discretionary act.[7] There are innumerable federal, state and local laws

[7] On page 37 of Appellant's Substitute Brief, Kunzie asserts sovereign immunity cannot bar the breach of contract claim he asserts in Count III (ROA p. 41). The case cited by Plaintiff in support of his argument, *Gavan v. Madison Memorial Hospital,* 700 S.W.2d 124, 126-27 (Mo.App.E.D. 1985) is distinguishable. First and foremost, as stated by this court in *Johnson v. McDonnell Douglas Corporation,* 745 S.W.2d 661 (Mo. banc 1988) an employee handbook does not create contractual rights. *Id*. at 662-63; *see also Remington v. Wal-Mart Stores, Inc.*, 817 S.W.2d 571, 577 (Mo.App. S.D. 1991).

governing the employment, discipline and termination of at-will employees as well as legislation concerning the termination of employees employed by a governmental body. A task such as the termination of a long-term, high-ranking municipal official such as Kunzie is not a task that is taken lightly. Innumerable legal, administrative and operational concerns must be weighed prior to making such a critical decision. Such decisions, in the instant case carried out by the City's highest ranking executive officer, are clearly within the category of a discretionary act.

Personnel decisions, such as the decision at issue in the instant case, are simply not akin to the governmental acts which have been deemed ministerial, such as a police officer's adherence to a policy and procedure for securing a prisoner's property as described in this Court's decision in *Jungerman*. The City Manager's judgment, reasoning and analysis were employed in making the decision to terminate Kunzie's

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Moreover, while it is true sovereign immunity does not shield a governmental entity from a claim under the terms of a contract, Kunzie has not pleaded a true breach of contract claim. *Scher v. Sindel,* 837 S.W.2d 350, 354 (Mo.App.E.D. 1992)(setting forth elements to breach of contract claim under Missouri law). As discussed more thoroughly below, Kunzie's breach of contract claim is inextricably intertwined with his wrongful discharge claim. In effect Kunzie's claim in Count III is nothing more than a claim of damages suffered as a result of his alleged wrongful discharge. Accordingly, dismissal of the wrongful discharge claim operates as a dismissal of the purported contract claim.

employment. Kunzie's termination was not the result of rote adherence to procedure. The facts in the instant case establish Kunzie's discharge was clearly a discretionary act by the City Manager. Accordingly, Kunzie's claims are within the scope of the City's immunity from suit and were properly dismissed by the trial court

V. CONCLUSION

Wherefore, for all of the foregoing reasons, Respondent, the City of Olivette, Missouri respectfully requests this Honorable Court affirm the Judgment entered in favor of the City and deny Kunzie's prayer for reversal and remand.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 84.06(b)

I, Corey L. Franklin, hereby certify that I am the attorney for the City of Olivette, Missouri, and that the forgoing Brief of the City of Olivette, Missouri:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Mo.R.Civ.P. 84.06(b);
3. Contains 5,447 words, excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix.

The undersigned further certifies that the disk submitted herewith contains the foregoing Substitute Brief of Respondent in Microsoft Word XP format. Said disk has been scanned for the presence of computer viruses and is virus free.

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AFFIDAVIT OF SERVICE

STATE OF MISSOURI)
)
COUNTY OF SAINT LOUIS)

I, Corey L. Franklin, hereby certify that I have on this _____ day of October, 2005, served two true and correct copies of the foregoing City of Olivette's Brief as well as a copy of the aforementioned brief on a "floppy" disk on the following by depositing same with the United States Postal Service, first class mail, postage prepaid, addressed as follows:

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